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10/698,799	10/31/2003	Pradip Roy	67500-658	2462

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EXAMINER

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ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 07/19/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

DETAILED ACTION

Response to Arguments

1. Applicant's arguments with respect to claims 1-45 have been considered but are moot in view of the new ground(s) of rejection. Applicant argues on page 10 of the remarks that the 1-80% taught by Kepplinger et al refers to the amount of fruit concentrate utilized in the formula not the amount of fruit solids in the fruit concentrate. However, Kepplinger et al teach that the fruit concentrates could comprise a puree of any desired fruit, fruit powders, fruit juice, fruit juice concentrates and combinations thereof ([0014]). One of ordinary skill in the art would envisage a fruit solids content in the range of 1-80% especially if utilizing fruit powders, which is a solid. Besides the claim language of dependent claim 4, 17 and 33 recite a “an evaporated fruit puree having a solids level of greater than 80% by weight”, as instantly claimed it appears that the 80% solids level only applies to the fruit puree and not the other forms of fruit solids i.e. dried fruit powder, drum dried fruit solid and freeze dried fruit solid.
2. Applicant argues on page 10 of the remarks that the 1-80% taught by Kepplinger et al refers to the amount of fruit concentrate utilized in the formula not the amount of fruit solids in the fruit concentrate. However, Kepplinger et al teach that the fruit concentrates could comprise a puree of any desired fruit, fruit powders, fruit juice, fruit juice concentrates and combinations thereof ([0014]). One of ordinary skill in the art would envisage a fruit solids content in the range of 1-80% especially if utilizing fruit powders, which is a solid. Besides the claim language of dependent claim 4, 17 and 33 recite a “an evaporated fruit puree having a solids level of greater than 80% by weight”, as instantly claimed it appears that the 80% solids level only applies to the

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fruit puree and not the other forms of fruit solids i.e. dried fruit powder, drum dried fruit solid and freeze dried fruit solid.

3. In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., period of time to set gel and temperature) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

Claim Rejections - 35 USC § 103

4. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

5. Claims 1-45 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kepplinger et al (US 2002/0192345) in view of Zietlow et al (US 6,432,460). With regard to claims 1-6 and 14-20, Kepplinger et al disclose an aerated food component having a high fruit content ((0011) lines 1-2), the amount of fruit concentrate utilized varies from 1 to 80%, but the preferred range is from 5 to 20% as in claims 3, 15 and 16 ((0014) lines 9-13), these ranges are within applicant's recited range. However, Kepplinger et al failed to disclose a solids level greater than 80% as in claim 17. It would not have involved an inventive step to increase the level of solids from 80% to 81% or higher because the level is already high enough to be able to incorporate other ingredients absent any clear and convincing evidence and/or arguments to the contrary. The fruit concentrate can comprise a puree of a desired fruit, fruit juice, fruit powders and combinations thereof as in claims 4 ((0014) lines 1-5). The aerated food component has a moisture content of

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from 14 to 30%, but can be dried to a moisture content from 1 to 6% as in claims 6, 19 and 20 (0012). However, Kepplinger et al failed to disclose hexametaphosphate as a component.

Zietlow et al teach an aerated confection such as marshmallows comprising 50 to 98% of a saccharide component such as fruit juices, purees, concentrated fruit juices (abstract, col 5 lines 13-18) and a calcium source from about 0.15% to 10% by weight including calcium hexametaphosphate (col 6 lines 45-46, col 7 lines 20-22). Zietlow et al is silent as to utilizing the hexametaphosphate as a gelling agent, however, one of ordinary skill in the art would expect that the compound would provide identical characteristics to the confection as instantly claimed because it is a similar compound and would expect it to provide a gelling characteristic.

6. With regard to claims 7 and 27, Kepplinger et al disclose a flavor content of 1.16% and a color content of 0.27%. These percentages are within applicant's recited range. (See page 4, table 2).

7. With regard to claims 8, 13, 21 and 26 Kepplinger et al disclose a variety of sweeteners that can be utilized at a range from 10 to 90% including corn syrup, sucrose ((0013)); this range is within applicant's recited range. Claims 8 and 21 further require the use of a seed sugar. Table 1 shows granulated sugar, applicant's specification disclose particular fine sugars ((0013)). No patentable distinction is seen at this time in the use of the granulated sugar and the use of a seed or "fine" sugar absent a showing of unexpected result using the claimed seed sugar. Therefore, it would have been obvious to one of ordinary skill in the art to use the granulated sugar of the reference as a sweetener absent a showing of unexpected results using a seed sugar.

8. With regard to claims 9-12 and 22-25, Kepplinger et al disclose that ionic hydrocolloid compounds such as alginate, carrageenan or low methoxy pectin could be utilized in an aerated

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product to help form stable aerated structures at a range from 0.1 to 5%, this range is within applicant's recited range((0015 and (0016)). Kepplinger et al also disclose that other ingredients such as guar gum; xanthan gum etc could be utilized (0022). It would be obvious to expect that these compounds will also function as film-forming agents because they have the same components.

9. With regard to claims 28-30, 33, 40 and 42, Kepplinger et al disclose that the aerated food product can be used in a variety of ways, it can be a stand-alone marshmallow-type snack or it can be incorporated as part of other food products ((0024) lines 1-4). A sample was prepared by combining water, high fructose corn syrup, sugar, and gum as in claim 30. The mixture was heated to 88% solids as in claims 29 and 33, and then cooled to 100oF, which is below the crystallization temperature of the sucrose solution ((0025)). The cooled mixture was then combined with the other ingredients in amounts as recited above such as fruit puree, flavor, color etc. The mixture was aerated by mixing using a paddle on high speed for 5 minutes ((0025). A particular amount of a hexametaphosphate has been disclosed above. However, Kepplinger et al failed to disclose the density of the aerated product and adding a particular amount of a hexametaphosphate. Zietlow et al teach an aerated food product, especially marshmallow with about 1 to 30% moisture and having a density of about 0.1 to 1.0g/cc (abstract). By conversion this is 0.8 to 8pds/gallon. This range is within applicant's recited range as in claims 28 and 42. It would have been obvious to one of ordinary skill in the art to modify Kepplinger et al with the teaching of Zietlow et al to expect that as the referenced composition possesses the elements as instantly claimed, it would be considered inherent that the density is similar absent any clear and convincing evidence and/or arguments to the contrary.

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10. With regard to claims 31-32, Kepplinger et al disclose a sugar solution heated to 246°F and then cooled to 180°F (0030). These temperatures are within applicant's recited range.

11. With regard to claims 34 and 35, Kepplinger et al disclose an aerated food component having a high fruit content ((0011) lines 1-2), the amount of fruit concentrate utilized varies from 1 to 80%, but the preferred range is from 5 to 20%. These ranges are within applicant's recited range.

12. With regard to claim 36, Kepplinger et al disclose a variety of sweeteners that can be utilized at a range from 10 to 90% including corn syrup, sucrose ((0013)), and table 1 shows granulated sugar. However, Kepplinger et al failed to disclose adding seed sugar to the cooled sucrose solution. Zietlow et al teach a method of preparing an aerated confection by seeding a liquid confection blend with dry sugar crystals to form a seeded liquid confection and then aerating and drying to form a dried aerated confection piece (abstract). Applicant's specification discloses particular fine sugars (0013). No patentable distinction is seen at this time in the use of the granulated sugar and the use of a seed or "fine" sugar absent a showing of unexpected result using the claimed seed sugar. Therefore, it would have been obvious to one of ordinary skill in the art to use the granulated sugar of the reference as a sweetener absent a showing of unexpected results using a seed sugar.

13. With regard to claims 37-39, Kepplinger et al disclose that ionic hydrocolloid compounds such as alginate, carrageenan or low methoxy pectin could be utilized in an aerated product to help form stable aerated structures at a range from 0.1 to 5%, this range is within applicant's recited range ((0015) and (0016)). Kepplinger et al also disclose that other ingredients such as guar gum; xanthan gum etc could be utilized ((0022)).

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14. With regard to claims 43-45, Kepplinger et al disclose that the aerated food product can be extruded into a desired shape ((0024)) and that the product has a moisture content of from 14 to 30%, but can be dried to a moisture content from 1 to 6% (0012). This range is within applicant's recited range.

Conclusion

1. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Adepeju Pearse whose telephone number is 571-272-8560. The examiner can normally be reached on Monday through Friday, 8.00am - 4.30pm.


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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